

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
LARRY D. VAUGHT, JUDGE

DIVISION IV

CACR07-323

January 23, 2008

CHRISTOPHER CHAD NICHOLS  
APPELLANT

APPEAL FROM THE BOONE  
COUNTY CIRCUIT COURT  
[CR05-193-3]

V.

HON. JOHNNY RAY PUTNAM,  
CIRCUIT JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant Christopher Chad Nichols was convicted by a Boone County jury of rape, first-degree sexual assault, and second-degree sexual assault. He was sentenced to a total of eighty years' imprisonment in the Arkansas Department of Correction. On appeal, Nichols contends that the trial court erred in denying his motions for directed verdict, in denying his motion to suppress evidence, in finding that he was competent to stand trial, and in allowing the expert testimony of a forensic-nurse examiner. We affirm.

On July 15, 2005, Christina Nichols reported to police that she suspected that her husband had sexually abused her five-year-old daughter, J.W. During J.W.'s interview with police, she described various acts of Nichols that supported her mother's suspicions.

Sergeant Gilbert Neil of the Harrison Police Department brought Nichols in for questioning. During the interview, Nichols confessed to the sexual abuse.

Nichols's first point on appeal is that the trial court erred in denying his motions for directed verdict. Specifically, he argues that the State "has not proven that any sexual intercourse or deviate sexual activity took place at all." He further asserts that "the only direct evidence the State has is [J.W.]'s statement that sexual activity took place" and that her testimony is uncorroborated and conflicting. Finally, he argues that "there isn't even any circumstantial evidence to support a conviction of rape." The State contends that Nichols failed to preserve this argument for appeal by failing to specifically argue at trial what elements and proof were lacking. We agree.

Where a motion for directed verdict is made, Arkansas Rule of Criminal Procedure 33.1 requires that it specifically state how the evidence is deficient. *Smith v. State*, 367 Ark. 274, \_\_\_ S.W.3d \_\_\_ (2006); Ark. R. Crim. P. 33.1(a) (2007). Rule 33.1 further provides that the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required by the rule will constitute a waiver of any question pertaining to sufficiency of the evidence. Ark. R. Crim. P. 33.1(c) (2007). The motion must specifically advise the trial court as to how the evidence was deficient. *Smith, supra*. The reason underlying this requirement is that it allows the circuit court the option of either granting the motion, or, if justice requires, allowing the State to reopen its case to supply the missing proof. *Id.* Our supreme court has repeatedly held that it will not address the merits of an appellant's insufficiency argument where the directed-verdict motion is not specific. *Id.*

At trial, Nichols only argued that the State failed to prove the elements of the crimes. He failed to specifically argue what proof or elements were lacking. Now, on appeal his arguments are far more specific. He argues that there was no evidence that any sexual intercourse or deviate sexual activity took place; that there was no physical evidence to support a rape conviction; and that there was no evidence, direct or circumstantial, to corroborate J.W.'s testimony. None of these arguments were made at trial. Because Nichols's directed-verdict motions were nonspecific objections insufficient to preserve the argument for appeal, we do not reach the merits of the sufficiency argument.

Nichols next argues that the trial court erred in denying the motion to suppress his confession. He contends that his confession was involuntary and inadmissible because it was obtained illegally through false promises made by Sergeant Neil. The alleged false promises made by Sergeant Neil were that anything Nichols had "done wrong could be corrected" and that Nichols was "not necessarily" going to jail. He contends that the alleged false promises, coupled with his vulnerability (lack of intelligence, inexperience with the criminal justice system, and questionable competence) demand that his confession be suppressed.

A statement induced by a false promise of reward or leniency is not a voluntary statement. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003). When a police officer makes a false promise that misleads a defendant, and the defendant gives a confession because of that false promise, then the confession has not been made voluntarily, knowingly, and intelligently. *Id.* In deciding whether there has been a misleading promise of reward or leniency, this court views the totality of the circumstances and examines, first, the officer's

statement and, second, the vulnerability of the defendant. *Id.* Factors to be considered in determining vulnerability include: (1) the age, education, and intelligence of the accused; (2) how long it took to obtain the statement; (3) the defendant's experience, if any, with the criminal-justice system; and (4) the delay between the Miranda warnings and the confession. *Id.* We will not reverse the trial court's denial of a motion to suppress a statement unless it is clearly erroneous or clearly against the preponderance of the evidence. *Id.*

A review of the content of Nichols's video-taped confession is required to address this issue. After Sergeant Neil advised Nichols of the accusations, the sergeant said, "anything you've done wrong can be corrected. Okay. And you can get over it and everything." Nichols first denied the accusations. Sergeant Neil continued by telling Nichols that "sometimes there's a little malfunction in yourself" but "you can get help, all right?" Nichols responded with, "But that means going to jail." Sergeant Neil answered, "Not necessarily. We don't know what the prosecutor's going to do. Like I said, what's the prosecutor going to want to hear? Okay. Remorse, sorrow, requests for help. What does that look for? That means you're sorry for it. Right?" At that point during the interview, Nichols said, "I am sorry" and then asked, "How can I get help?" Sergeant Neil responded: "We can get that taken care of. Okay, through the system, we can get you help." The sergeant told Nichols that he needed to tell the truth, at which time Nichols stated, "There's been some times that, some things that have happened." Nichols then proceeded to confess to sexually abusing J.W.

Based on the evidence, the trial court concluded that the confession was legal, finding that there were no false promises made by Sergeant Neil and further that Nichols was not

vulnerable. We agree. The record is void of any false promises of leniency made by Sergeant Neil to Nichols. Furthermore, at the suppression hearing, Sergeant Neil explained the statements that Nichols now questions. When asked why he stated to Nichols that he might “not necessarily” go to jail for sexually abusing his step-daughter, Sergeant Neil testified that he immediately followed that statement with a direct reference to the prosecutor because the prosecutor would make that decision. When asked what he meant when he told Nichols that anything he had done could be corrected, Sergeant Neil testified that he meant that, if Nichols needed therapy, it would be supplied to him while he was incarcerated.

Moreover, while Nichols argues his confession was illegal because he was vulnerable, there are facts to the contrary. Nichols was twenty-eight years old at the time he gave his confession. He was married, employed, and had obtained his GED. He did have experience with the criminal justice system because he had a prior conviction for theft. Throughout the video-taped interview, Nichols appears aware of his surroundings and circumstances, and was very responsive and cooperative. The entire interview lasted less than seventeen minutes with the confession made minutes after Nichols waived his Miranda rights. For the reasons discussed above, we hold that the trial court was not clearly erroneous in finding that Nichols’s confession was not illegally obtained and should not be suppressed.

Nichols’s third point on appeal is that the trial court erred in finding that Nichols was competent to stand trial. At the competency hearing, Dr. Nancy Bunting, a clinical psychologist with specialized training in forensic evaluations, testified that she evaluated Nichols and concluded that he did not have a mental disease and furthermore that he was

competent in all respects to stand trial. As part of the evaluation, Nichols completed the Georgia Competency Test and scored seventy points out of one hundred. Dr. Bunting testified that a score of over seventy is a passing score, but she testified that she considered Nichols's score of seventy a passing score because there were questions he would not answer (whether he committed the crime or details concerning the crime) and as a result sixteen points were automatically deducted. Therefore, Dr. Bunting concluded that Nichols actually scored an eighty-four, which was well above the passing score. She further testified that even if she accepted Nichols's score of seventy, based on her entire evaluation of Nichols, this score was a "borderline" passing score. Dr. Bunting conceded that she used her discretion in reaching this opinion.

Following the competency hearing, Dr. Bunting submitted a letter to the trial court explaining that the Georgia Competency Test is merely a screening instrument that provides guidelines, not "black-and-white" test results. She stated that a low score on the Georgia Competency Test does not automatically mean an individual is unfit to stand trial; rather, it is an indication that further inquiry or assessment of competency is necessary. She reiterated her opinion that while the score of seventy in Nichols's case was a borderline score, she considered it a passing score based on his lack of neurological problems or injuries and his incredible assertion that he suffered a blackout for the entire length of the interview with Sergeant Neil. Finally, Dr. Bunting attached to her letter a statement of Dr. Charles H. Mallory, Director of Forensic Training at the Arkansas State Hospital, who corroborated her opinions.

Subsequently, the trial court entered an order finding that Nichols was competent to stand trial. In so ruling, the trial court relied upon the testimony offered at the competency hearing and Dr. Bunting's letter. On appeal, Nichols argues that the trial court erred in finding him competent when he did not receive a passing score on the Georgia Competency Test.<sup>1</sup>

The test for competency on appeal is whether substantial evidence supports the trial court's finding. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006). Substantial evidence has been defined as "that which is forceful enough to compel reasonable minds to reach a conclusion one way or another and requires more than mere speculation or conjecture." *Id.* at 390, 230 S.W.3d at 532. When determining whether there was substantial evidence to support a trial court's ruling regarding competency, our supreme court has held that "[i]t is permissible to consider only the testimony which supports a finding" of competency. *Id.*

The expert opinions of Dr. Bunting and Dr. Mallory were that the Georgia Competency Test was merely a guideline for determining competency to stand trial and that a score of seventy points did not automatically mean that an individual is incompetent. Moreover, the Georgia Competency Test was just one piece of evidence relied upon by Dr. Bunting, and more importantly the trial court, in reaching the conclusion that Nichols was

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<sup>1</sup>Nichols also argues that his Fifth Amendment privilege against self-incrimination was violated because he was penalized on the test for refusing to admit his guilt. This argument was not raised below; therefore, it is not preserved for appeal.

competent to stand trial. Other evidence included Dr. Bunting's examination of Nichols (which included the gathering of Nichols's social, medical, and educational histories and conducting a basic mental status exam), and her review of the police reports (which included interviews given by Nichols, Christina, and J.W. and the written statement of Christina). As a part of this evaluation, Dr. Bunting opined that Nichols's claims of memory loss, which Nichols stated lasted the entire length of the police interview, were feigned. We hold that this is substantial evidence supporting the trial court's finding that Nichols was competent to stand trial.

Nichols's final point of error is that the trial court erred in allowing the expert testimony of a forensic-nurse examiner, Andrea Hudson. Hudson, a registered nurse, testified that in July 2005, she was employed with Jamerson Forensic, where she specialized in conducting forensic evaluations in child-maltreatment and sexual-assault cases. When the State offered Hudson as an expert witness in the field of sexual-assault examination, Nichols objected. The trial court questioned the State, "Do you intend to ask hypothetical or elicit opinion?" The State responded, "Your Honor, I intend to look at opinions as to whether or not the lack of physical evidence is going to be consistent with this type of abuse. Where there are no physical findings, should that mean that abuse has not occurred?" The trial court responded, "For that purpose I will allow it."

Hudson went on to testify that in July 2005, she examined J.W. for sexual-assault injuries. She concluded that J.W.'s physical examination was normal and that there were no injuries to J.W.'s hymen or vaginal cavity. Hudson continued to testify that the fact that there



were no injuries in those areas does not necessarily mean that a sexual assault did not occur. Nichols again objected to Hudson’s testimony, arguing that she was testifying about “hypotheticals”—beyond her examination of J.W.—and that she had not been qualified as an expert. The trial court responded:

Court: Are you objecting that she’s not an expert to talk about this?  
Defense: No, I’m not.  
Court: You’re not saying that?  
Defense: No, I’m not.

On appeal Nichols contends that the trial court erred in allowing Hudson to testify as an expert when she had not been qualified as one. The State’s response is that Nichols waived this argument. We agree.

We have held that when an objection is withdrawn, it is as though the objection was never made. *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). The appellate court, moreover, will not consider arguments that are raised for the first time on appeal. *Id.* In the instant case, the trial court specifically asked Nichols’s counsel whether he was objecting to Hudson’s expert witness status and twice counsel for Nichols responded that he was not. Therefore, Nichols is making this objection for the first time on appeal, and the law is clear that we will not consider it. *Id.*

Affirmed.

BIRD and GLOVER, JJ., agree.